United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/868
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 868

Case No. 961: BEKELE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 7 November 1996, Michael Bekele, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 February 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order, inter alia:

"(i) [The rescission of] the decision of July 24, 1996, rendered by the ... Secretary-General ...

...

(ii) ... the immediate reinstatement of the Applicant into his functions with all formal and material consequences attached thereto as well as the reimbursement, to the Applicant, of all costs incurred by the latter during the preceding appeal proceedings since the decision of July 22, 1992, taken against him by the Director of the Department of Human Resources and Management.

...

[or, alternatively]

... to pay to the Applicant [his] salary from September 25, 1991 until the date on which the Applicant will have reached the age of ordinary retirement.

...

[or]

(iv) If the Administrative Tribunal was to consider that the Joint Appeals Board ought to have examined the appeal:

Order the return of the matter to the Joint Appeals Board in order for the latter to examine the appeal filed by the Applicant.

..."

Whereas the Respondent filed his answer on 10 February 1998;

Whereas the Applicant filed written observations on 8 May 1998;

Whereas the Applicant filed an annex to his written observations on 14 May 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered service of the United Nations on 27 January 1969, as Distribution Clerk at the G-1 level, on a short-term contract that was successively extended through 30 June 1972. He was promoted to the G-2 level, on 31 August 1971. On 1 July 1972, he entered the service of UNHCR as a Clerk, at the G-4 level, on a one-year fixed-term appointment which was extended on 1 July 1973, and again, on 1 July 1974. On 6 March 1974, he was promoted to the G-5 level, with effect from 1 November 1973. On 1 July 1975, he was granted an indefinite appointment. On 1 August 1975, he was promoted to the G-6

level, and his title was changed to Senior Clerk. On 1 December 1978, he became Assistant Programme Officer and was promoted to the P-1 level. On 1 November 1979, he was assigned to Luanda, Angola. On 1 December 1980, he became Associate Programme Officer and was promoted to the P-2 level. On 8 December 1982, the Applicant was reassigned to Geneva, to the Central and West Africa Section. On 1 January 1983, his title was changed to Associate Area Desk Officer. On 1 December 1987, he was reassigned, for one year, as Programme Officer in Nairobi, Kenya.

On 27 January 1989, the Applicant received a telex instructing him to return to Geneva by 1 February 1989. The Applicant was authorized to take annual leave from 4 September through 16 October 1989. In a cable dated 17 October 1989, the Applicant sought permission from Personnel Service in Geneva, to extend his annual leave through 10 November 1989, so that he could settle matters relating to his personal effects. On 19 October 1989, the Applicant received authorization to do so. The Applicant did not report to work on 10 November. On 17 November 1989, he requested a further extension of his annual leave through the end of that month. By cable dated 28 November 1989, the Chief, Personnel Administration Section (PAS) granted the Applicant's request but ordered him to report for duty in Geneva by 4 December 1989, at the latest. The Applicant did not do so. On 7 December 1989, the Applicant informed Headquarters that due to a malaria attack, he was unable to report for duty as instructed. He did not respond to the Administration's request for medical confirmation of his illness. On 13 December 1989, the Administration notified the Applicant that, because his absence was unauthorized, he would be considered as having abandoned his post and had, therefore, been separated from service with effect from 4 December 1989.

On 13 August 1990, the Applicant was reinstated on "pure humanitarian grounds" with effect from 4 December 1989. On 22 October 1991, he was placed on special leave with half pay, with effect from 25 September 1991. His absence was considered as certified full sick leave, through 2 December 1990, and he was found to be 50 per cent fit for work starting

3 December 1990.

On 2 October and 20 December 1991, a physician with the Joint Medical Service found that the Applicant continued to be 50 per cent fit for work. On 13 February 1992, the Director, Medical Service, recommended that the Applicant should be granted a disability benefit.

On 9 July 1992, the Chief of the Geneva Office of the United Nations Joint Staff Pension Fund (UNJSPF) informed the Applicant that the UN Staff Pension Committee had determined that he was incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund.

On 22 July 1992, the Director, Division of Human Resources Management (DHRM), confirmed to the Applicant that he would be the recipient of a disability benefit and that his permanent appointment would be terminated, in accordance with staff rule 109.3, with effect from 25 September 1991.

On 10 August 1992, the Applicant wrote to the Director, DHRM, contesting the decision that he was incapacitated for further service and requesting that he be given a new assignment. In response, the Chief, PAS, informed the Applicant, by letter dated 31 August 1992, that he should contact the UNJSPF directly if he wished to address matters concerning his disability benefit. On 8 October 1992, the Applicant wrote to the Chief, PAS, to request a new assignment and to contest again the decision to place him on disability.

On 22 December 1992, the Applicant wrote to the High Commissioner (with copies to the Secretary-General, the Legal Counsel and the Director, DHRM), seeking her intervention in the matters of the termination of his appointment and the granting of a disability benefit.

On 5 February 1993, the Applicant requested the Secretary-General to review the administrative decision to terminate his appointment and grant him a disability benefit.

On 14 April 1993, the Chief, Administrative Review Unit, informed the Applicant that his request for review had been received by that office on 13 April 1993. In the absence of a further reply, the Applicant, on 8 July 1993, lodged an appeal with the Joint Appeals Board

(JAB). The JAB adopted its report on 26 June 1996. Its findings, conclusion and recommendation read, in part, as follows:

"...

41. The members of the Panel noted that the Appellant was notified of the termination of his indefinite appointment based on incapacity for further service, by the Director, DHRM, under cover of a letter dated 22 July 1992. The Appellant wrote to the Secretary-General to request the administrative review of the contested decision on 5 February 1993, whereas under staff rule 111.2(a) 'such a letter must be sent within two months from the date the staff member received notification of the decision in writing'. The Panel remarked that the Appellant submitted his request to the Secretary-General with a four and a half months delay.

42. Pursuant to staff rule 111.2(f) and to Article 13 of the Rules of Procedure of the Geneva Joint Appeals Board, the Panel examined the possible existence of 'exceptional circumstances' that could allow a waiver of the prescribed time-limits. The members of the Panel also examined the restrictive definition of 'exceptional circumstances' given by the jurisprudence of the UNAT and the ILOAT, as in cases of ILOAT No. 955, Pineau (1989) and of UNAT No. 372, Kayigamba (1986). The Panel observed that, following the notification of his separation from service, the Appellant wrote to Director, DHRM, to contest the Administration's decision and subsequently sent letters to the UNJSPF and then to the High Commissioner on 22 December 1992. Nevertheless, the majority of the Panel considered that these letters did not constitute 'exceptional circumstances beyond the control of the Appellant' precluding him from writing to the Secretary-General within the prescribed time period.

Conclusion and recommendation

43. The majority of the Panel concluded that the appeal was time-barred and was not able to establish the existence of 'exceptional circumstances' to justify a waiver of the time-limits.

44. Consequently, the majority of the Panel makes no recommendation in support of this appeal."

One member of the Panel dissented, noting that "[the Appellant's] delay could be related to 'exceptional circumstances', beyond the control of the Appellant, as foreseen under

subparagraph (f) of staff rule 111.2."

On 24 July 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the conclusion of the majority of the Panel that your appeal is time-barred and that they were not able to establish the existence of 'exceptional circumstances' to justify a waiver of the time limits. He has also noted that, consequently, they made no recommendation in support of your appeal. He has further noted the dissenting opinion of one Panel member who found that your appeal should be received by the Joint Appeals Board due to the existence of 'exceptional circumstances'.
>
> As the majority opinion found your appeal to be time-barred, the Secretary-General has decided to take no action in respect of your case."

On 28 February 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The appeal should not have been deemed time-barred. The Applicant was never informed of the possibility to appeal against the decisions, to whom to address his appeal, and the time-limit in which his appeal had to be filed. The Applicant was engaged in on-going discussions with the Administration regarding his status, and thus he could not know from what date the time-limit began to run. Furthermore, the Applicant was not in his full state of health until 21 December 1992, according to his medical certificate, and he did request review of the decisions within two months of that date.

2. The Applicant should not have been granted a disability benefit nor separated from service. The UNJSPF did not have accurate medical information about the Applicant when it granted him a disability benefit. The Applicant was found to be 50 per cent fit to work since 1990 and in December 1992 was found to be 100 per cent fit. Thus, he could not

have been found to be totally disabled in July 1992.

Whereas the Respondent's principal contention is:

The Applicant has not proved that there existed sufficient cause to rescind the recommendation of the JAB, accepted by the Secretary-General, that the appeal was time-barred.

The Tribunal, having deliberated from 30 June to 31 July 1998, now pronounces the following judgement:

I. The Applicant's appointment was terminated by letter, dated 22 July 1992, from the Director, Division of Human Resources Management of the Office of the UN High Commissioner for Refugees. There followed a long exchange of correspondence between the Administration and the Applicant, but the termination decision was not rescinded. On 5 February 1993, the Applicant asked for a review of the decision under staff rule 111.2, which requires that a letter must be sent to the Secretary-General "within two months from the date the staff member received notification of the decision." He acted after the two-month period had lapsed following receipt of the letter of 22 July 1992. He received a letter, dated 14 April 1993, from the Chief, Administrative Review Unit, which stated, inter alia, that "the Secretary-General always reserves the right to raise the issue of receivability and competence, as deemed appropriate." The Applicant thereupon appealed to the Joint Appeals Board (JAB) within the time limit prescribed by the Staff Rules after he received this letter, not having received any other response from the Secretary-General. The JAB rejected his appeal on the ground that his request for review by the Secretary-General had been time-barred, the Secretary-General having raised, before the JAB, the objection based on the timeliness of the request for administrative review.

II. Whatever the terminus a quo for the filing of the request for administrative review in this case, the issue that arises is whether there were exceptional circumstances which excused the Applicant from asking in a timely manner for administrative review, circumstances which the JAB should have recognized as warranting a waiver of the time limits and the examination of the Applicant's case on its merits.

III. The JAB may declare an appeal receivable despite the applicant's failure to request review of the contested administrative decision within the two-month time limit. Thus, if the JAB determines that exceptional circumstances prevented an applicant from requesting, within the permitted time limit, review of the administrative decision, it has the discretion to receive the appeal. As the Tribunal stated in Piquilloud (Judgement No. 713 (1995), paragraph I):

> "According to the practice followed by the Secretary-General, in accordance with staff rules 111.2 (a) and 111.2 (b), a waiver of the time-bar in requests for re-examination of administrative decisions contested by staff members of the Organization may be granted in 'exceptional circumstances'. According to the Tribunal's practice, these circumstances are defined in the following manner: 'any circumstances beyond the control of the Appellant which prevented the staff member from submitting a request for review and filing of an appeal in time, may be deemed exceptional circumstances' (cf. Judgement No. 372, Kayigamba (1986))."

In this case, two members of the JAB determined that no exceptional circumstances excused the Applicant from requesting review within the prescribed time limit. One member of the JAB dissented, finding that exceptional circumstances may have prevented the Applicant from reacting in a timely manner to the decision to terminate his appointment and place him on a disability benefit. The dissenting member noted that two exceptional circumstances were present in this case. First, the Applicant was in poor health and "he might not have been in a position to think clearly and decisively to send his contest to the Secretary-General." Second, he did submit a challenge to the decision to the Director, Department of Human Resources

Management on 10 August 1992, to which the Administration responded by letter dated 31 August 1992, that he should address any matters concerning his disability benefits to the UN Joint Staff Pension Fund (UNJSPF). What the Administration failed to do was to advise him that he should, under staff rule 111.2, request a review, by the Secretary-General, of the decision to terminate his employment.

The Tribunal concludes that the Applicant may have been misled by the Administration's instruction to address the matter to the UNJSPF and not informing him that any challenge to the decision had to be addressed to the Secretary-General in accordance with staff rule 111.2(a). These were exceptional circumstances which should have induced the JAB to excuse the Applicant for his untimeliness in filing for administrative review.

This is a sufficient ground for the Tribunal to order the Applicant's case to be remanded to the JAB. The Tribunal does not examine the merits.

IV. For the above reasons, the Tribunal orders that the case be remanded to the JAB for examination on the merits.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/869
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 869

Case No. 962: SILVEIRA-CROTTY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas at the request of Celine Silveira-Crotty, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, 31 August, and 30 November 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 25 November 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended until 31 March 1997, the time-limit for the filing of a corrected application with the Tribunal;

Whereas, on 31 March 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"...

(b) [To order the Secretary-General to:]

[i] Implement Administrative Tribunal Judgements #458 and 497, Silveira, as Applicant continues to suffer harassment, prejudice and discrimination in the Office of Legal Affairs,

... [ii] Grant Applicant a post and compensation at the G-7 level ascribed to the post she encumbered retroactive from 1988 together with her seniority in grade and in the Organization,

(d) [To] find that the Respondent has made libellous and unfounded comments on Applicant's character and to award Applicant compensation accordingly,

(e) [To] grant Applicant compensation for the actions of the Administration incompatible with her rights,

(f) [To] grant Applicant compensation for having to unnecessarily pursue the time-consuming, demoralizing and costly appeals procedures through the Administrative Tribunal,

(g) [To] grant Applicant compensation for the suffering and humiliation inflicted upon her; for the moral wrongs; and for the violation of her rights to fair and equitable treatment in general, and for full and fair consideration for career development and promotion in particular.

..."

Whereas the Respondent filed his answer on 15 July 1997;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 11 September 1972, on a fixed-term appointment as a Clerk Stenographer (E) at the G-3 level, in the Office of Public Information. On 21 December 1972, the Applicant was transferred to the Department of

Economic and Social Affairs. She served on a series of fixed-term appointments until 21 July 1973, when she was granted a probationary appointment. On 1 September 1974, she was granted a permanent appointment. On 14 March 1977, the Applicant was transferred to the International Trade Law Branch of the Office of Legal Affairs (OLA). On 1 April 1977, the Applicant was promoted to the G-4 level. The Applicant has since worked for OLA, in different sections of the Office. On 28 November 1988, she was assigned to the Treaty Section of OLA, where she continues to work.

On 16 November 1988, the Applicant requested the Secretary-General to review the administrative decision to submit her "fact sheet," which contained a reference to the rebuttal of her performance report, to different departments and offices, in order that they consider her for possible assignment. She also requested review of the decisions ordering her to report for duty in OLA and charging her absence to annual leave.

On 5 April 1989, the Applicant requested the Secretary-General to review the administrative decision of 15 December 1988, to withhold 17 days pay from her January 1989 pay check, and the decision to deny her sick leave for her "job-related anxiety/stress disorder". The JAB consolidated both appeals and adopted its report on 1 August 1989.

On 1 September 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined her case in the light of the JAB's report and had decided to maintain the contested decisions. He also noted the JAB's unanimous recommendation that "a fresh effort be made by both the Administration and the appellant to find a solution to this case".

In its Judgement No. 458, Silveira, rendered on 7 November 1989, the Administrative Tribunal noted that it was "satisfied that [the appraisal of the Rebuttal Panel's report] was made with due care and was not affected by prejudice, sexual harassment, improper motive or other irregularity". (Cf. para. IX) The Tribunal agreed with the recommendation made by the JAB that the Administration continue to make every effort to transfer the Applicant outside OLA.

On 30 November 1989, the Applicant filed an appeal to the Tribunal contesting the Respondent's adoption of the JAB's conclusions and recommendations, in which the JAB found frivolous the Applicant's appeal against the decisions, inter alia, that she report for duty at OLA and that her "fact sheet" be circulated. On 21 March 1990, the Applicant filed a second appeal with the Tribunal seeking revision of Judgement No. 458, Silveira. The Tribunal ordered joinder of the two appeals. On 8 November 1990, the Tribunal rendered Judgement No. 497, Silveira on the two appeals, upholding the decisions of the Respondent and rejecting the applications in their entirety. The Tribunal reiterated "its hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued". (Cf. para. XVI)

On 4 and 7 December 1989, the Assistant Secretary-General for Human Resources Management, informed the Applicant that her post in the Treaty Section was to be abolished by 31 December 1989, and that her name would be placed on a list of staff to receive priority consideration for placement in another post. On 13 May 1991, the Respondent offered the Applicant an agreed termination package with a substantially increased termination indemnity. On 23 May 1991, the Applicant refused the Respondent's offer. According to the Applicant's personnel file, the Respondent continued to make numerous attempts to place the Applicant outside OLA. None of these attempts was successful. On 5 March 1992, the Applicant was informed that she would be reassigned, effective 9 March 1992, within the Treaty Section, from the Publications Unit to the Depositary Functions Group. She protested the decision to reassign her, and on 30 March 1992, requested administrative review of the decision. On 6 May 1992, she was informed by the Director of Staff Administration and Training Division, Office of Human Resources and Management, that the decision to reassign her was being withdrawn.

On 17 June 1993, the Applicant instituted a recourse before the Appointment and Promotion Panel in connection with her non-inclusion in the 1993 G-7 Promotion Register, but was unsuccessful.

On 5 January 1994, the Applicant requested the Secretary-General to review the Administration's failure to implement the Administrative Tribunal's Judgements 458 and 497. On 4 February 1994, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1993 G-7 Promotion Register.

On 11 April 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 16 November 1995. Its considerations, conclusions and recommendations, read, in part, as follows:

"Considerations

...

139. The Panel noted the numerous and continuous efforts by the Administration to accommodate the Appellant by transferring or reassigning her from the OLA. The Panel considered the genuineness of these efforts, as well as the Appellant's rejection of certain offers and opportunities she deemed unsatisfactory.

140. The Panel unanimously agreed that the efforts by the Administration to abide by the Tribunal's decisions had been genuine attempts to find a solution and had been pursued persistently and exhaustingly.

141. The Panel further considered the Appellant's contention that she was denied a promotion to the GS-7 level in the Office of Legal Affairs in spite of 'her higher and specialized academic qualifications, very good performance at the G-7 level, with complete loyalty to the Organization, and her twenty-one years of service in various Departments, including 17 years in OLA itself.'

...

143. The Panel has recognized that staff members have the right to be considered for promotion on the basis of objective considerations free from bias and discrimination. However, in this case, the Panel noted that the Appellant did not allege that her lack of promotion to the GS-7 level was vitiated by improper procedures or motives. The Panel does not have the authority to assess the substantive merits of any staff member's request for promotion or to compare them with those of his or her colleagues who were promoted.

144. With regard to the Appellant's complaint that the Respondent failed to grant her a special post allowance to the GS-7 level from December 1988 to March 1992, the Panel notes staff rule No. 103.11(a) and 103.11(b) which state that the granting of a special post allowance is discretionary with the Secretary-General.

145. With regard to the Appellant's expanded pleas, ... the Panel notes that it is improper to remove or insert documents in any staff member's file without his or her consent. Furthermore, any staff member is entitled to examine his or her own files and ask for the removal of material improperly inserted or the inclusion of material improperly excluded.

Conclusions and Recommendations

146. On the basis of the aforesaid considerations, the Panel concluded that the Appellant failed to show convincingly that her 'rights' as a U.N. staff member had been violated. Reasonable efforts by the Administration to implement the Tribunal's recommendations were undertaken and, on occasion, thwarted by the Appellant herself. Based on this conclusion, the Panel does not recommend awarding the Appellant any compensation.

147. The Panel, therefore, decided to recommend that no action be taken on the appeal."

On 20 November 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted the Board's conclusions that you failed to show convincingly

that your rights as a U.N. staff member had been violated. It found further that reasonable efforts by the Administration to implement the Tribunal's recommendations were undertaken and, on occasion, thwarted by you and does not recommend awarding you any compensation. In accordance with the Board's recommendation, the Secretary-General has decided to take no further action on your case."

On 31 March 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent has failed to implement Administrative Tribunal Judgements Nos. 458 and 497, having failed to place the Applicant in a post outside OLA.

2. The Respondent should have included her name in the 1993 G-7 Promotion Register, in view of the fact that she has been at the G-4 level for 20 years and that she has been filling a post that should have been classified at the G-7 level.

3. The Applicant is entitled to a post with substantive functions.

Whereas the Respondent's principal contentions are:

1. The record clearly shows the Respondent has dedicated an exceptional amount of time and resources trying to reassign or transfer the Applicant from OLA, thus implementing Administrative Tribunal Judgements Nos. 458 and 497.

2. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-promotion.

3. The Applicant has no entitlement to a special post allowance at the GS-7 level, and the conditions for granting such a special post allowance were not met.

The Tribunal, having deliberated from 2 to 31 July 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General of the United Nations dated 20 November 1995, accepting the Joint Appeals Board's (JAB) conclusions that the Applicant "failed to show convincingly that her 'rights' as a United Nations staff member had been violated" and that "reasonable efforts ... to implement the Tribunal's recommendations" had been undertaken by the Administration. (Cf. Judgements No. 458, Silveira (1989) and No. 497, Silveira (1990)).

II. In her application, the Applicant argues that the Respondent failed to implement Judgements No. 458, Silveira and No. 497, Silveira, as he did not make every genuine effort to implement in good faith the recommendation of the Tribunal that she be transferred to a post outside the Office of Legal Affairs (OLA); that the Respondent failed to promote her to the GS-7 level, especially in the light of the fact that none of her colleagues have her seniority or qualifications; that she had not been assigned substantive functions for over 3 years; and that the Respondent failed to grant her a special post allowance (SPA) to the GS-7 level from December 1988 to March 1992.

The Applicant requests the Tribunal to order the implementation of Judgements Nos. 458 and 497; to grant her a post and compensation at the GS-7 level; to find that the Respondent has made libellous and unfounded comments on her character; and to grant her compensation for various violations of her rights, and for moral suffering.

III. On 7 November 1989, the Tribunal rendered Judgement No. 458, Silveira, rejecting all of the Applicant's pleas. At the same time, the Tribunal expressed trust that efforts to

transfer the Applicant out of OLA "will be vigorously pursued". One year later, in Judgement No. 497, Silveira, dated 8 November 1990, the Tribunal once again accepted the JAB's conclusions that the Applicant's appeal was frivolous and reiterated its "hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued." It appears from the Applicant's submissions that she considered the Tribunal's pronouncements as constituting an order that the Respondent reassign the Applicant. This is not so.

IV. The Tribunal notes from the record that the Respondent undertook persistent efforts and expended an exceptional amount of time and resources in order to reassign the Applicant from OLA, or alternatively, to find another solution for the situation, but those efforts were unsuccessful. It appears that the Respondent undertook approximately 50 administrative actions and approached no less than 20 different offices in an effort to resolve the Applicant's situation. A certain number of these offers of reassignments were rejected by the Applicant whereas others were not pursued due to the impossibility of finding a department willing to accept the Applicant.

V. Having reviewed the record, the Tribunal can only arrive at the conclusion reached by the JAB in its thorough report that the Respondent's efforts were made in good faith. This is reflected not only in the number of attempts made to reassign the Applicant, but also in the earnest tone of OLA's repeated requests for the Applicant's transfer from the department. No bias was shown to exist in the Respondent's efforts.

VI. Regarding the Applicant's submission that she be granted a post at the GS-7 level, the Tribunal has consistently held that staff members have no right to be selected for a

particular post or promotion. Although the Tribunal agrees that every qualified staff member has a right to be fairly considered for a promotion, the staff member has no right or legal expectancy to a promotion. In Judgement No. 134, Fürst (1969), the Tribunal held that "[a]ppointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same." This is consistent with staff regulation 1.2, which provides, inter alia:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations."

Accordingly, the Tribunal agrees with the JAB finding that the Applicant was considered for promotion in accordance with established administrative procedures and therefore, that her non-promotion did not violate her rights, and did not demonstrate any bias by the Administration. The Respondent showed good faith in implementing the prior judgements of the Tribunal.

VII. The Applicant contends that she was performing functions at the GS-7 level and therefore was entitled to an SPA at that level. The Tribunal notes that staff rule 103.11(a) provides that:

> "Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts."

Staff rule 103.11(b) provides, inter alia, that:

> "... a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

VIII. The Tribunal has had to pronounce itself on this issue on many occasions. It has held that the granting of an SPA is within the discretion of the Secretary-General (Judgement No. 275, Vassiliou (1981)) and that there is no obligation on the part of the Administration to grant an SPA to every individual who might be regarded as possibly falling within the terms of staff rule 103.11(b) (Judgement No. 342, Gomez (1985)). Moreover, according to personnel directive PD/1/84/Rev.1, the SPA is not normally payable at more than one level higher than that of the staff member's grade, except when a staff member in the General Service category is granted an SPA to the Professional category. The Tribunal concludes that, even if the Applicant's claim of performing functions at the GS-7 level were correct, she would have no right to an SPA in accordance with the criteria set out in PD/1/84/Rev.1. In any event, the Applicant has not satisfied the Tribunal that she is performing functions other than those of her post, at the GS-4 level.

IX. The Tribunal notes that this is the third appearance of the Applicant before the Tribunal. The Applicant may be reminded that the principle of res judicata is recognized by the Tribunal. The JAB erred in allowing the Applicant to raise issues that the Tribunal had previously decided in its Judgements Nos. 458 and 497.

X. For the foregoing reasons, the Tribunal finds:

1. That the Administration properly implemented Administrative Tribunal Judgements Nos. 458, Silveira and 497, Silveira;

2. That the Applicant's rights were not violated when she was not promoted from the GS-4 to the GS-7 level; and

3. That not granting the Applicant an SPA did not violate her rights.

XI. Accordingly, the application is rejected in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Victor YENYI OLUNGU
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

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AT/DEC/870
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 870

Cases No. 964: CHOUDHURY
No. 965: RAMCHANDANI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Deborah Taylor Ashford, Vice-President, presiding;
Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas, on 8 March 1996, Pradeep Kumar Choudhury and K.H. Ramchandani, staff members of the United Nations Military Observer Group in India and Pakistan (hereinafter referred to as UNMOGIP), filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicants, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May and 31 August 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 24 May 1996, the Applicants again filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicants, the President of theTribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1996 and 31 March 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1997, the Applicants again filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 April 1997, the Applicants, after making the necessary corrections, filed applications containing pleas which, inter alia, requested the Tribunal:

> "[i] ... to rescind the Respondent's decision of February 1996 regarding the non-inclusion of the Applicant[s] in the 1992 promotion list;
>
> ...
>
> [ii] ... to find:
>
> (d) that the decision to exclude the Applicant[s] from the 1992 promotion list was a consequence of discrimination within the UNMOGIP promotion panel against staff members of Indian nationality in New Delhi and thus contravened the principle of equality as established in Article 8 of the Charter;
>
> ... [and]
>
> [iii] ... to order:
>
> (a) that the Applicant[s] ... be fairly considered by the relevant promotion bodies on an equal footing and on the basis of merit with other candidates and not be penalized for being ... New Delhi staff member[s] of Indian nationality;
>
> ...
>
> (c) the award of two years net base salary as compensation for salary lost due to the non-progression of the Applicant[s'] career[s] caused by the biased decisions of the Appointment and Promotion Panel;
>
> ..."

Whereas the Respondent filed his answer in case No. 964 on 17 July 1997;

Whereas the Respondent filed his answer in case No. 965 on 16 October 1997;

Whereas the Applicants filed written observations on 30 June 1998;

Whereas, on 1 July 1998, the Tribunal put questions to the Respondent to which he provided answers on 9 July 1998;

Whereas, on 13 July 1998, the Tribunal put additional questions to the Respondent to which he provided answers on 16 July 1998;

Whereas, on 27 July 1998, the Applicants submitted comments on the Respondent's reply;

Whereas, on 5 August 1998, the Respondent submitted a response to the Applicants' comments of 27 July 1998;

Whereas the facts in the case are as follows:

The Applicant Choudhury entered the service of the United Nations on 1 January 1975, on a one-year fixed-term appointment as an Office Boy at the G-1 level, with UNMOGIP. His appointment was extended for a further fixed-term of one year. On 1 January 1977, it was converted to an indefinite appointment and his functional title was changed to Office Boy/Mimeograph Operator at the G-2 level. On 1 April 1980, he was promoted to Senior Mimeograph Operator at the GS-2A level, and on 1 April 1982, to Typist Clerk at the GS-3 level. On 1 October 1984, his grade was changed to ND-4 (GS-4), to coincide with revised levels of the New Delhi General Service Salary Scale. On 1 April 1985, he was promoted to Senior Typist/Clerk at the GS-5 level. The overall rating on all his performance evaluation reports (PERs) since 1977 has been "A very good performance".

The Applicant Ramchandani entered the service of the United Nations on 16 August 1984, on a three-month fixed-term appointment as an Office Management Assistant at the ND-5 level with UNMOGIP. On 1 October 1984, his grade was changed to ND-6 to coincide with revised levels of the New Delhi General Service Salary Scale. His fixed-term appointment was successively extended until 16 September 1985, when he was granted an indefinite appointment. His grade level was changed to ND-5 on 1 July 1994, when the salary scale was converted to a seven-level structure. The overall rating on his PER for the period 12 July 1988 through 28 February 1993, was "an excellent performance".

By memoranda dated 21 September, 30 October and 23 November 1992, the Chief, Field Personnel Section, Field Operations Division (FOD), transmitted to the Office of Human Resources Management (OHRM), FOD's recommendations for promotion, based on the review and recommendation of the 1992 UNMOGIP Subsidiary Promotion Review Panel (SPRP) for locally-recruited General Service staff. The Panel had recommended eight staff members for promotion. The Applicants were not among them. On 23 November 1992, the Staff Administration and Training Division, OHRM, recommended to the Director of Personnel, the promotion of three of the eight staff members.

On 10 January 1993, the Officer-in-Charge, UNMOGIP, informed all UNMOGIP locally-recruited General Service staff of the names of the three staff members whose promotions had been approved, and advised them of their right to submit a recourse letter to Working Group I of the Appointment and Promotion Panel (APP) at Headquarters.

On 22 January 1993, the Applicant Choudhury instituted a recourse before the APP requesting that his name be included in the 1992 Promotion Register. He attached a "job description" prepared by him, requesting comparison between his job description and other jobs at the same level in other UN agencies. The letter was forwarded to the 1992 SPRP for its comments.

Also on 22 January 1993, the Applicant Ramchandani instituted a recourse before the APP seeking the inclusion of his name in the 1992 Promotion Register, claiming that, when he was first appointed, he was assured that he would be promoted within a year, and that, furthermore, the duties he performed were at least at the ND-8 level, when compared with similar posts at other UN agencies in New Delhi. His letter was forwarded to the 1992 SPRP for its comments.

The 1992 UNMOGIP SPRP did not recommend that the Applicants' names be included in the 1992 Promotion Register.

By a cable dated 28 October 1993, UNMOGIP was informed that the promotion of another staff member, one of the eight originally recommended, had been approved.

In a cable dated 31 December 1993, the Applicants were informed that the Acting Director of Personnel did not approve the addition of their names to the 1992 Promotion Register.

On 4 January 1994, the Applicants and four other locally-recruited General Service UNMOGIP staff in New Delhi cabled the Director, FOD, alleging that "Delhi Office local staff members have been completely deprived of promotions for the last ten to seventeen years when all the required qualifications for promotion are being fulfilled."

On 22 February 1994, the Applicants wrote to the Secretary-General requesting administrative review of the decision not to promote them. Having received no response to their request for review, on 3 June 1994, the Applicants lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 23 January 1996. Its considerations and recommendations read as follows:

"Considerations

41. The Panel reviewed the issues raised by this appeal in light of the contentions of the parties. It considered the Appellants' contention that they were denied a justified promotion, based on discriminatory reasons. The basis of this discrimination was delineated in their appeal dated 3 June 1994 and in their observations dated 24 February 1995, in which they asserted that preferential treatment was afforded to those local staff members who serve at the Rawalpindi location (where the Promotion Review Panel (PRP) always sits).

42. The Panel agreed that the Appellants have a right to be fully and fairly considered for promotion. However, the Appellants do not have the 'right' or legal expectancy to be promoted. The Administrative Tribunal has consistently held that staff members have no legally enforceable 'right' to be promoted. In Judgement No. 134, Fürst III (1969), the Tribunal stated that 'promotions are within the discretion of

the Secretary-General ...'

43. The Tribunal has recognized, however, that staff members have a right to be considered for promotion on the basis of objective considerations free from bias and discrimination. However, the burden of proof of the existence of these facts is on the Appellant. The Panel did not think that it had been discharged in this case.

44. The Panel further considered the issue of New Delhi staff representation on the Subsidiary Promotion Review Panel. It found that the lack of adequate staff representation on any recommendation bodies, especially dealing with promotions, is undesirable.

45. With respect to the Appellants' contentions that based on comparable positions at other UN agencies, Mr. Ramchandani should be a GS-8 and Mr. Choudhury, a GS-6, the Panel stated that this contention should be referred to the Administration in accordance with staff regulation 2.1, which states that '... the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.'

46. With respect to the Appellants' contention concerning official holidays (as set forth [above]), the Panel observed that UNMOGIP UN holidays should take into account the need of staff members to attend to their religious obligations.

Recommendations

47. On the basis of the aforesaid considerations, the Panel concluded that the Appellants failed to show convincingly that the decision not to include them in the 1992 promotion list violated their rights.

48. The Panel, however, recommends that the persistent absence of New Delhi staff from the Subsidiary Promotion Review Panel be looked into, with a view to remedying it.

49. The Panel further recommends that UNMOGIP UN holidays should take into account the need of staff members to attend to their religious obligations.

50. The Panel makes no further recommendation in support of the appeal."

On 2 February 1996, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicants and informed each of them as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that you failed to show convincingly that the decision not to include you in the 1992 promotion list violated your rights having not discharged the burden of proof on the existence of bias and discrimination. Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on your case.
>
> As regards the Board's recommendations in paragraphs 48 and 49, the Secretary-General will examine the implications to determine whether a change in the existing procedures is warranted."

On 11 April 1997, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants were not given proper consideration for promotion because of the "discriminatory practices of the Appointment and Promotion Panel".

2. The promotion process was flawed by improper procedures because the present structure of the SPRP in UNMOGIP lacks effective representation of New Delhi staff, resulting in a "pattern of discrimination" against Indian staff members in favour of Pakistani staff members.

3. The Applicant Ramchandani argues that posts comparable to his post, in other UN agencies, are classified at the GS-8 level, that his predecessor was at that level, and that his supervisor's assurances "created a legitimate expectancy of proper consideration and subsequent promotion" to that level.

Whereas the Respondent's principal contentions are:

1. Promotion is within the discretion of the Secretary-General. No staff member has either a legally enforceable expectancy or a right to promotion.

2. The decision not to promote the Applicants was not vitiated by prejudice or extraneous factors, nor was the promotion process procedurally flawed.

The Tribunal, having deliberated from 1 to 31 July 1998, now pronounces the following judgement:

I. The Tribunal finds that the Applicants Ramchandani and Choudhury raise the same legal issues and present comparable factual circumstances. The Tribunal therefore orders the joinder of the cases.

II. The Applicants claim that the decision not to include them in the 1992 Promotion Register was tainted with discrimination and unfairness. The Applicants appealed that decision to the Joint Appeals Board (JAB), which concluded "that the Appellants failed to show convincingly that the decision not to include them in the 1992 promotion list violated their rights."

III. The principal issues in these cases are:

(i) Whether the Applicants were discriminated against by the Respondent when he took the contested decision, and

(ii) Whether the decision was fairly taken, considering the composition of the Subsidiary Promotion Review Panel (SPRP) which did not recommend that the Applicants' names be included in the 1992 Promotion Register.

IV. The Tribunal has clearly stated in earlier cases that a staff member generally has no right to promotion. (Cf. Judgement No. 411, Al-Ali (1988), paragraph III). However, there may be circumstances such as occurred in Al-Ali, which give the staff members a right to promotion. Thus, there may be an agreement or promise, which can be proved, that gives a staff member a right to promotion. (Cf. Judgements No. 134, Fürst (1969) and No. 308, Karlik (1983)). On the other hand, a mere expectancy, however strong, does not give the staff member a right to promotion. (Cf. Judgements No. 312, Roberts (1983) and No. 375, Elle (1986)). While a decision not to promote is discretionary (Judgement No. 275, Vassiliou (1981)) it may be reviewed by the Tribunal in order to ascertain whether there has been an abuse of discretion because the discretion to promote is not absolute or unfettered. The Tribunal will not substitute its own judgement for that of the Administration (Vassiliou) but it will ascertain whether there has been an abuse of discretion.

V. In the present case, discrimination has been alleged as a ground for questioning the validity of the decisions taken by the Administration. It is the duty of the parties to provide the Tribunal with all the available evidence in order to enable it to pass judgement on whether the allegation made has been proven.

The Applicants allege that their rights to "a fair and unbiased consideration" were "violated by discriminatory practices of the Appointment and Promotion Panel". The Applicants adduce the following facts as evidence of discrimination: (i) the SPRP sat in Rawalpindi, Pakistan, (ii) the SPRP had representation only from the Rawalpindi office, and (iii) the number of staff promoted at the New Delhi office was low in comparison with the number of staff promoted from the Rawalpindi office. The Respondent explains the low rate of promotion for local staff in the New Delhi office by reference to the fact that most of the local staff in New Delhi were manual workers, a fact which the Applicants dispute. The Tribunal is of the view that none of the facts adduced by the Applicants, assuming them to be correct, support by themselves the conclusion that there was bias or discrimination against the

Applicants in the decision not to promote them. Among other things, in response to questions put by the Tribunal, the Respondent provided information which showed that in the period between 1987 and 1992, from the Rawalpindi office 42 per cent of those recommended and 23 per cent of those eligible for promotion were promoted, while from the Srinagar and New Delhi offices combined, 44 per cent of those recommended and 18 per cent of those eligible for promotion were promoted. On the basis of the record, the Tribunal finds that it cannot determine conclusively that there was bias or discrimination against the staff of the Srinagar and New Delhi offices.

VI. With regard to the second issue, the Tribunal notes that according to the Respondent's admission in proceedings before the JAB:

> "Participation of local staff members in the Subsidiary Promotion Review Panel in UNMOGIP is through nomination by the Local Staff Association in Rawalpindi which has a membership of 30. A Local Staff Association (LSA) in Srinagar, with membership of 7, although not normally consulted, has never objected to the nominations of the Rawalpindi LSA. The 6 staff members of the New Delhi Office are neither members of the Srinagar LSA (which is supposed to represent all staff on the Indian side of the Mission) nor do they have a separate union in New Delhi. As will be noted, the majority of staff are in Rawalpindi."

In reply to questions put by the Tribunal during these proceedings, the Respondent submitted a document containing a similar admission.

VII. It is a general principle of international administrative law that a committee involved in the taking of administrative decisions should be properly constituted. (Cf. Judgement No. 28, Wallach (1953)). The principle requires that, in the constitution of a committee, in keeping with the maxim that justice must not only be done but must be seen to be done, if there is representation, there must be properly distributed representation. The constitution of the SPRP was defective in this regard, and in fact, improper, as there was no representation,

direct or indirect, of the LSA in Srinagar or of the staff in New Delhi. As a result, there was disproportionate representation of the LSA in Rawalpindi. The Respondent's explanation for this lack of representation was that travel restrictions between Pakistan and India prevented representation from staff in the Srinagar and New Delhi offices. The Tribunal finds this explanation to be inadequate. Following the recommendations of the JAB, the Respondent indicated that "he will examine the implications [of, inter alia, the persistent absence of New Delhi staff from the SPRP] to determine whether a change in the existing procedures is warranted." The record indicates that no change has been made.

The disproportionate representation is a procedural irregularity which violated the rights of the Applicants. It is not necessary for the Applicants to show that, had there been proper representation, they would have been promoted. What is relevant is that there was improper constitution of the SPRP which could have affected the chances of the Applicants' being promoted. Furthermore, the fact that the SPRP was an advisory body and not the authority taking the final decision on promotions is also immaterial. Insofar as it gave advice, its advice was tainted by the procedural irregularity. This is sufficient injury to the Applicants, for which compensation is due.

VIII. The Applicants also make a subsidiary claim that they had an expectancy of being promoted. The Applicant Ramchandani relies on the conduct of his supervisor in virtually assuring him that he would be promoted. This conduct did not amount to a giving of a promise that the Applicant would be promoted nor is there evidence of an agreement to promote the Applicant. A mere expectancy of promotion does not create a right to promotion. This claim, therefore, fails.

IX. From the evidence provided by the Respondent in reply to questions put by the Tribunal, it would appear that the grade levels of those promoted in the years 1987 through 1992 were generally lower in the Indian (New Delhi and Srinagar) offices than in the

Rawalpindi office. This may reflect anomalies in the classification of posts or may be the result of irregularities in the promotion procedures as described in paragraphs V, VI and VII above. The Tribunal strongly recommends that the Respondent conduct a proper review of the classification of General Service posts at the Srinagar and New Delhi offices.

X. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to each of the Applicants three months of the Applicants' respective net base salary at the rate in effect on the date of this judgement;

2. Orders the Respondent to undertake a meaningful review of the constitution of the UNMOGIP appointment and promotion bodies with a view to securing fair representation of all staff in the India and Pakistan offices.

3. Rejects all other pleas.

(Signatures)

Deborah Taylor ASHFORD
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/871
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 871

Cases No. 967: BRIMICOMBE
No. 968: ABLETT

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms Deborah Taylor Ashford, Vice-President, presiding; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 18 April 1997, Maria-Carmen Ablett and Regine Brimicombe, former staff members of the International Maritime Organization (hereinafter referred to as IMO), filed applications, each requesting the Tribunal "to rule that the Applicant is entitled to all the benefits of Judgement No. 612 of the Tribunal, as interpreted by the Tribunal in its Judgement No. 695."

Whereas the Respondent filed his answer to both applications on 17 December 1997;

Whereas the Applicants filed joint written observations on 23 March 1997;

Whereas the Respondent filed his reply to the Applicants' written observations on 12 June 1998;

Whereas, on 7 July 1998, the Tribunal put questions to the Respondent to which he provided answers on 10 July 1998;

Whereas the facts in the case are as follows:

Maria-Carmen Ablett was a staff member of IMO from 1 January 1974 until 31 July 1989, when she retired as an Editor-Proofreader at the G-8, step VIII level. She is a Spanish national who, from the time of her recruitment to the date of her retirement, served as a locally recruited staff member.

Regine Brimicombe was a staff member of IMO from 11 February 1974 until 30 June 1990, when she retired as Supervisor of the French Word Processing Unit. She is a French national, who, from the time of her recruitment to the date of her retirement, served as a locally recruited staff member.

On 1 July 1993, the Administrative Tribunal rendered Judgement No. 612, Burnett et al., in which it held that the applicants, IMO staff members living in the United Kingdom when recruited, who had been treated as "locally recruited" even though they were not nationals of the United Kingdom, should be granted international recruitment status retroactive to the date of their recruitment.

On 7 October 1994, the Applicant Ablett wrote to the Secretary-General asking for a retroactive change in her recruitment status on the same basis as those of her former colleagues who had benefited from the Tribunal's Judgement No. 612. In a letter dated 24 October 1994, the Secretary-General promised a substantive reply to her concerning the issues she had raised, once those matters had been reviewed.

On 29 November 1995, the Director of the Administrative Division wrote to the Applicant as follows:

> "The Secretary-General has no objection to you meeting with me to discuss your status at IMO in the light of UNAT Judgement No. 612. However, I should

advise you that, after careful consideration, we are not able to contemplate applying the terms of the UNAT Judgement to retired staff members."

On 11 January 1996, the Applicant Ablett wrote to the Secretary-General asking him to review that administrative decision. In a reply dated 9 February 1996, the Secretary-General informed the Applicant that there were "neither legal nor policy grounds for changing the decision concerning [her] recruitment status." On 7 March 1996, the Applicant Ablett lodged an appeal with the Joint Appeals Board (JAB).

On 22 January 1996, the Applicant Brimicombe wrote a letter to the Director of the Administrative Division, requesting that Judgement No. 612 be applied to her because she had been informed that the Respondent had decided to apply Judgement No. 612 to certain of her former colleagues "who neither appealed nor intervened in the application to the Tribunal". She argued that because her situation was "identical to that of [her] former colleagues" who "have now received 'international recruitment status' and the corresponding benefits, with retroactive effect", she should receive the same treatment.

In a reply dated 29 January 1996, the Director of the Administrative Division confirmed that the Secretary-General had decided "to extend the terms of Judgement No. 612 of the United Nations Administrative Tribunal to certain staff members who neither initiated the original appeal nor intervened in it." He noted, however, that "the Secretary-General has decided not to include former staff members in this extension." The Applicant decided to treat this letter as the notification in writing for the purposes of staff rule 111.2(a) and, on 7 March 1996, wrote to the Secretary-General requesting him to review the decision. On 18 April 1996, she lodged an appeal with the JAB.

On 3 and 6 January 1997 respectively, the Applicants Brimicombe and Ablett wrote to the Secretary-General, asking for his agreement to submit their respective appeals

directly to the Administrative Tribunal "[s]ince the facts of the case are not in dispute, and the disagreement is purely a matter of law".

In the absence of a reply, the Applicants decided to submit their applications directly to the Tribunal "on the grounds that the failure of the Respondent Organization to set up a joint appeals board within a reasonable period of time and its failure to even acknowledge receipt of successive requests for action are a denial of access to the means of justice provided for in the Staff Regulations and Staff Rules and in the Statute of the Tribunal."

On 18 April 1997, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants' applications should be deemed receivable despite the lack of a JAB hearing or of the Respondent's agreement to submit the case directly to the Tribunal, because the Respondent has failed to convene a JAB within a reasonable time and has failed to respond to the Applicants' requests for direct submission.

2. Because the Respondent made a discretionary decision to extend the benefits of the Tribunal's Judgement No. 612 and No. 695 to members of the French and Spanish Typing Pool/Word Processing Units who did not initiate or intervene in the appeals, he exercised his discretion in a discriminatory manner by not extending such benefits to the Applicants, retired staff members who suffered from the same inequities as their colleagues who still serve the Organization.

Whereas the Respondent's principal contentions are:

1. The decision to extend Judgement No. 612 to non-applicants and non-intervenors was discretionary and thus, did not legally bind the Respondent to extend such judgement to former staff members.

2. The Applicants are not in the same factual or legal situation as those staff members who received benefits pursuant to Judgement No. 612, because the Applicants no longer work for the Respondent.

3. The decision to exclude former staff members from the application of Judgement No. 612 was a policy decision taken in the interests of the Organization.

4. The Applicants forfeited any rights they may have had by failing to act in a timely manner. The Applicant Brimicombe failed to challenge her recruitment status at any time during the 16 ½ years of her employment or during the 2 ½ years after Judgement No. 612 was rendered. The Applicant Ablett failed to challenge her recruitment status at any time during the 15 ½ years of her employment and for more than one year after Judgement No. 612 was rendered.

The Tribunal, having deliberated from 7 to 31 July 1998, now pronounces the following judgement:

I. The Applicants have requested that their claims be joined and the Respondent offers no objection. Cases may be appropriate for joinder when they contain similar pleas, relate to the same matter of law, or raise identical issues of fact and law. The Tribunal finds that the Applicants Ablett and Brimicombe raise the same legal issue and present comparable factual circumstances. The Tribunal finds it appropriate to join these claims in a single judgement.

II. This appeal is based on the Respondent's refusal to grant the Applicants' request that they receive international recruitment status in accordance with Judgements Nos. 612 and 695 of this Tribunal. On 22 January 1996, the Applicant Brimicombe requested a retroactive change in her employment status to "international recruitment status" on the

same basis as those to whom UNAT Judgement No. 612 was extended by the Respondent's decision.

III. In a letter dated 29 November 1995, the Director, Administrative Division, notified the Applicant Ablett that the Respondent was "not able to contemplate applying the terms of [Judgement 612] to retired staff members".

IV. On 18 April 1996, both Applicants filed an appeal with the Joint Appeals Board (JAB). On 22 April 1996, the Head of the Personnel Policy Unit acknowledged receipt of the Applicants' appeal and informed them that she would "pass the envelope [containing the appeal] to the Chairman" once a JAB had been established to hear the case. The Applicants received no further communication from the Respondent in spite of several attempts to ascertain the status of their appeal. On 3 January 1997, the Applicants wrote to Respondent stating their intention to submit their appeals directly to the Tribunal in accordance with article 7, paragraph 1, of its Statute. The Applicants received no response to their request for the Respondent's consent to this direct appeal.

V. Although the Respondent has not challenged the applications on the basis of receivability, the Tribunal is of the view that this issue must be addressed as a preliminary matter. The Tribunal finds that this case presents an exception to the general rule, stated in article 7, that an applicant must exhaust administrative remedies, including a JAB hearing, in order to establish receivability. Article 7, section 1 of the Statute provides that "an application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body." The only exception expressly provided is "where the Secretary-General and the applicant have agreed to submit the application directly to the

Administrative Tribunal." The Tribunal finds that the Applicants made consistent, appropriate efforts to present their dispute before the JAB only to be ignored for more than eight months. This delay is not consistent with the "maximum of dispatch" necessary to "a fair review" as provided for in IMO staff rule 111.1(j). The Applicants made an appropriate effort to obtain consent from the Respondent prior to submitting this application directly.

VI. Although the Tribunal has not previously established exceptions to the requirements in article 7, the Secretary-General's apparent inaction raises the question of the circumstances under which the Tribunal might consider an article 7 exception. The Tribunal agrees with the International Labour Organization Administrative Tribunal's statement that, "the rule [in Article VII of the ILOAT Statute, regarding exhaustion of internal administrative remedies] is not a hard-and-fast one" and that derogation from the rule should be permitted "if the complainant has done his utmost to obtain [an internal administrative] decision but on the evidence a decision seems unlikely to be taken in a reasonable time." (In re Klajman, ILOAT Judgement No. 791 (1986)). The Tribunal finds this case to be appropriate for an exception to article 7 receivability rules. The Applicants made diligent efforts to obtain internal review; there are no disputed issues of fact; and the Applicants have already endured an unjustified delay in having their dispute resolved. To remand the application to the JAB would only create further delay in resolving this dispute without any commensurate increase in accuracy or fairness. In finding that this case is receivable, the Tribunal reminds the Respondent of the importance of respecting both the letter and spirit of the Staff Rules.

VII. The Respondent asserts that the claim should be time-barred because the Applicants should have challenged their recruitment status in the course of their employment (each more than fifteen years with IMO) or during the course of the proceedings that led to

Judgement No. 612. It is a well-established precedent of this Tribunal that the starting point for measurement of the time bar is "the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered" (cf. Judgement No. 549, Renninger (1992)). The requests that form the basis for this application were not made by the Applicants Brimicombe and Ablett for two and a half years and for more than one year, respectively, after Judgement No. 612 was rendered. The rendering of Judgement No. 612, however, is not the appropriate point for measuring the time bar, nor is the appropriate point the Respondent's answer to the Applicants' requests to extend Judgement No. 612 to them. The Applicant's claims are based on a request for a change in their recruitment status, which recruitment occured in 1974. During the more than 15 years that the Applicants, who were hired as local recruits, worked alongside other staff members who had international recruitment status, they made no complaint about their status. In 1994, when the Applicant Ablett "appealed", she had ceased to be a staff member of IMO five years earlier. In 1996, when the Applicant Brimicombe appealed, she had ceased to be a staff member of IMO six years earlier. At no time during the prior 20-22 years since the Applicants had first been recruited as "local recruits" did either Applicant request that her recruitment status be changed to "international". The Tribunal finds that the claims are time-barred, as the Applicants knew or should have known of the differences in the benefits attaching to their recruitment status.

VIII. The Applicants have asserted that IMO extended Judgement No. 612 to other current staff members and excluded former staff members and that this constituted an abuse of discretion. In fact, after a review of the facts applicable to each staff member, the Secretary-General agreed that requests received from four current staff members for a change in their recruitment status be granted. At least one other current staff member made a similar request that was not granted after the Agency determined that the staff member was not similarly situated to the Applicants in Judgement No. 612.

IX. It is not disputed by the parties that the Respondent had the authority to make a decision regarding whether to extend the benefits of Judgement No. 612 to those current staff members who were not parties to that judgement who requested that their status be changed also. The Tribunal agrees with the parties that the Respondent had the authority to make a decision regarding application of these benefits to other staff members. The Tribunal will approve an administrative decision that is not arbitrary or outside lawful boundaries. The Tribunal will not substitute its own judgment for that of the administrative authority. (Cf. van der Valk, Judgement No. 117 (1968)). The Respondent had a decision to make following Judgement No. 612. He might have extended the benefits only to the parties and according to the terms of the decision (later clarified in Judgement 695). Alternatively, he might have extended the benefits of the new rule to all staff members, past and present, who might have benefited from the decision had they been parties. Instead, the Respondent decided to extend the benefits only to current staff members who had not been parties to the judgement. The Respondent defends this decision with considerations of staff morale, finality and certainty. The Respondent might legitimately be concerned that, following Judgement No. 612, staff members doing identical work under identical hiring circumstances might be receiving different benefits according to whether they had been parties to the judgement.

X. With respect to the question of whether the benefits ought to have been extended to all staff members, including former staff members like the Applicants, who might have been affected by Judgement No. 612, the Tribunal finds that it was reasonable for the Respondent to decline to do so. As stated in paragraph VII above, if the Applicants had wished to challenge their recruitment status, the appropriate time to do so was within two months of their recruitment, in accordance with staff rule 111.2, and certainly within their employment, when they knew or should have known of their claim.

XI. In view of the foregoing, the applications are rejected in their entirety.

(Signatures)

Deborah Taylor ASHFORD
Vice-President, presiding

Julio BARBOZA
Member

Kevin HAUGH
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

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LIMITED

AT/DEC/872
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 872

Case No. 971: HJELMQVIST

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, at the request of Lars J. Hjelmqvist, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 June, 30 September and 31 December 1996, 31 March and 30 June 1997, the time-limit for the filing of an application with the Tribunal;

Whereas, on 1 May 1997, the Applicant filed an application requesting the Tribunal, inter alia, to find:

> "(a) ... that Respondent's failure to provide appropriate devices for physical protection in a known high-danger area was an act of gross negligence and the proximate cause of Applicant's irreparable physical and psychological injuries;
>
> (b) ... that Respondent's failure to institute and utilize appropriate procedure for medical evacuation from a known high-danger area was an act of gross negligence and the proximate cause of Applicant's irreparable physical and psychological injuries;
>
> (c) ... that Respondent's failure to act in accordance with PD/1/1992, i.e. to medically evacuate Applicant '... to the place nearest to the duty station where

adequate medical facilities are available ... was an act of gross negligence and the proximate cause of Applicant's irreparable physical and psychological injuries;

(d) ... that Applicant, having been medically evacuated from Iraq to Sweden and officially stationed there from 18 August 1992 until 7 May 1993, was entitled to daily subsistence allowance, given his status as a locally recruited General Service staff member;

...

(g) ... that the extraordinary delay ... in entertaining Applicant's case by the Advisory Board on Compensation Claims was an act of gross negligence;

(h) ... that Respondent's failure to pay Applicant his monthly salary from 1 September 1992 until 29 April 1996 as he was entitled to in accordance with article 11.1(b) of Appendix D to the Staff Rules, was an act of gross negligence;

(I) ... that Respondent's ordering and sending Applicant, on 13 September 1993, from New York, his duty station, to Sweden for medical treatment without any necessity of medical evacuation as stated in PD/1/1992, was a deliberate, wrongful act and the proximate cause of the exacerbation of Applicant's physical and psychological injuries;

(j) ... that having been ordered and sent from New York, his duty station, to Sweden, and officially stationed there from 13 September 1993 until 25 June 1995, Applicant, a locally recruited General Service staff member, was entitled to daily subsistence allowance;

(k) ... that Respondent's failure to pay Applicant the above entitlement while in Sweden from 13 September 1993 until 25 June 1995 violated his right to due process;

(l) ... that Respondent's denial to date to pay the entitlement addressed in (I) above, based on the deliberate false interpretation of PD/1/1992, is a willful tortious act;

...

(n) ... that Respondent's refusal to provide any explanations of the conclusions and recommendations of the Advisory Board on Compensation Claims violates

Applicant's right to due process;

(o) ... that the forty-thousand-six-hundred-sixty-two dollars[sic] (US $40,162.00[sic]) offered by Respondent for Applicant's permanent vascular and orthopaedic injuries, [and] his chronic Post Traumatic Stress Disorder ..., resulting from the injuries suffered in the line of duty, is inadequate compensation;

(p) ... that Respondent's continuous and extraordinary delays in payment to Applicant's physicians was an act of gross negligence and a contributing cause to the exacerbation of Applicant's psychological injuries;

(q) ... that Respondent's withholding payment for medication without counter-indication to its necessity was a deliberate wrongful act and a contributing cause to the exacerbation of Applicant's psychological injuries;

(r) ... that Respondent's refusal to allow Applicant to view his medical file is an obstruction of justice and the violation of Applicant's right to due process;

(s) ... that Respondent's refusal to allow Applicant to view the file pertaining to his case at the Advisory Board on Compensation Claims is an obstruction of justice and the violation of Applicant's right to due process;

(t) ... that Respondent's refusal to allow Applicant to view his personal file maintained by the Security and Safety Service is an obstruction of justice and the violation of Applicant's right to due process;

(u) ... that Respondent's absolute disregard of the mandates contained in ST/IC/82/77/Rev.1 and ST/IC/88/19 regarding the management and control of Personal and Official Status Files is an act of gross negligence and in violation of Applicant's right to due process;

[and to order the Respondent:]

[I] To make available the files [the Applicant requested];
[ii] [To] comply with the directives contained in ST/IC/82/77/Rev.1 and ST/IC/88/19;
[iii] [To] pay damages to Applicant in the sum of one-million dollars (US $1,000,000.00);
[iv] [To] pay punitive damages to Applicant in the sum of one-million dollars (US $1,000,000.00)."

Whereas the Respondent filed his answer on 29 September 1997;

Whereas, at the direction of the Tribunal, the parties submitted an Agreed Statement of Facts on 21 May 1998;

Whereas the Applicant filed written observations on 26 May 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 6 July 1998, the Tribunal put questions to the Respondent, to which he provided answers on 16 and 31 July 1998;

Whereas, on 20 July and 3 August 1998, the Applicant provided his comments on the Respondent's 16 and 31 July 1998 submissions, respectively;

Whereas the facts in the case are as follows:

The Applicant entered the service of the UN on 8 September 1987, on a short-term appointment, as a locally-recruited Security Officer at the S-1 level at UN Headquarters. His appointment was extended until 1 March 1988, when he was granted a nine-month fixed-term appointment. That appointment was extended a number of times, for various periods ranging from 3 months to one year, until 2 April 1996. On 1 October 1988, he was promoted to the S-2 level.

The Applicant was placed on special sick leave from 17 August 1992 through 2 April 1996, when he was separated from service for reasons of health.

On 27 May 1991, the Applicant commenced service with the United Nations Guard Contingent in Iraq (UNGCI). As of 15 June 1991, the Applicant was assigned to Suleimaniyah in the Northern Territory.

On 17 August 1992, the Applicant and two colleagues left Suleimaniyah at about 9.15 a.m. in a UN vehicle on patrol to Kalar, about 150 kilometers away. Approximately 45 kilometers from Kalar, several shots were fired from a hill to the right of the vehicle. The Applicant, who was sitting in the front passenger seat, was hit by a bullet which grazed his

right forearm and penetrated his lower abdomen. According to the Investigation Report and the Board of Inquiry, the Guard in the back seat attempted emergency first aid to stop the bleeding. Some 30 minutes after the shooting incident, the Applicant was taken to the dispensary at Kalar where first aid was administered. He was then transferred by car, in a convoy, to Suleimaniyah Hospital, a journey of about two hours.

Also according to the Investigation Report, the Applicant was examined there by a general surgeon, an orthopaedic surgeon, and a neurosurgeon. He was X-rayed and given a blood transfusion. His condition was found to be stable, and his vital signs within normal limits.

On 17 August 1992, the UN representative in Suleimaniyah faxed a report on the "Shooting incident" to the UN Designated Official for Security, describing the Applicant as "in stable condition and alert" and "in high spirit". Because surgical intervention was necessary for his leg wound and facilities at Suleimaniyah were inadequate, the Senior Medical Officer, United Nations Special Commission (UNSCOM), Baghdad, recommended a medical evacuation. On the same day, the Senior Medical Officer, UNSCOM, asked the Deputy Medical Director of the UN Medical Service at Headqarters, by telephone, to authorize the medical evacuation of the Applicant. Authorization was given by the Deputy Medical Director for a medical evacuation to New York via Zurich. On 18 August 1992, a fax was prepared in New York to provide written confirmation of such authorization to the Senior Medical Officer, UNSCOM, in Baghdad. However, that fax, while marked "RUSH", was not transmitted until 19 August 1992.

According to the statement of facts agreed to by the parties, before the written authorization arrived in Baghdad, UNGCI arranged, in consultation with the Senior Medical Officer, UNSCOM, an immediate medical evacuation to Sweden, the Applicant's home country. Also according to that agreed statement of facts, as well as according to the 19 August 1992 report of the Senior Medical Officer, UNGCI, Baghdad, on 18 August 1992, the Applicant was driven from Suleimaniyah to Kirkuk by ambulance, flown from

Kirkuk to Baghdad by helicopter, transported to Habaniya airport, some 80 kilometers away, by UNSCOM ambulance, flown to Kuwait on an UNSCOM flight, and thence to Sweden on a Swiss Air-Ambulance.

In Sweden, the Applicant underwent several operations in Lund University Hospital, to remove such bullet fragments as were accessible and to transplant a vein from his right leg into his left to replace the ruptured femoral vein. He remained in intensive care for some time, supervised by a surgeon at Lund University Hospital. Soon after his surgery, the Applicant developed a thrombosis in his left leg, and was put on anticoagulants. On 30 September 1992, the Applicant was discharged from Lund Hospital. He then moved to Värnamo, where his parents lived, and his medical treatment was continued at Värnamo Hospital.

On 17 January 1993, the Applicant submitted a claim for compensation under Appendix D to the Staff Rules to the Advisory Board on Compensation Claims (ABCC) for reimbursement of his medical expenses.

In January 1993, the Deputy Medical Director wrote to the Applicant's surgeon in Lund asking for a medical report concerning the Applicant. The physician in Värnamo who was supervising the Applicant's anticoagulant therapy responded that his anticoagulant treatment would continue until March, and that he was due to be seen by his surgeon in Lund in February 1993. On 6 April 1993, the surgeon in Lund completed a Medical Statement in which he noted that the probable duration of the Applicant's disability would be until September 1993. On 14 April, that surgeon reported that, because of the continuing pain in the thigh after exercise, the Applicant would probably not be able to return to work as a Security Officer before September 1993.

On 8 April 1993, the Applicant requested travel authorization to return to New York. On the basis of the surgeon's Medical Statement, the Deputy Medical Director certified him to be fit to travel. He further authorized the Applicant to travel in Business class, based on the recommendation of the Applicant's surgeon. The Applicant returned to New York on

30 April 1993. The Medical Service referred him to a vascular surgeon for an evaluation. The vascular surgeon wrote on 25 May 1993, that the Applicant would require contrast venography to delineate the anatomy of his venous system, but felt that "the additional time of continued physiotherapy to build collateral is preferable at this time and intervention either diagnostically or therapeutically is premature". He noted that: "It is my feeling that his present plan of returning to Sweden in the late summer, at which point anticoagulants will be decreased, is satisfactory."

On 10 August 1993, the Applicant requested authorization to travel to Lund, Sweden, for re-examination by his surgeon, stating, "Depending on the result of the examination, surgery will be performed in Lund, Sweden". The Deputy Medical Director wrote to the Secretary, ABCC, endorsing this proposal.

The Applicant exhausted his entitlement to sick leave with full pay and sick leave with half pay combined with annual leave, in August 1993. On 1 September 1993, the Applicant was placed on special leave without pay under staff rule 105.2(a)(i) pending resolution of his status.

On 20 October 1993, the Applicant was examined by his surgeon in Lund, who reported that another year of anticoagulants was recommended, and that the Applicant had been referred to a plastic surgeon "for evaluation and probable correction". The surgeon concluded, "It is doubtful whether the patient ever will be completely recovered."

On 8 November 1993, the ABCC recommended that the injury be recognized as attributable to the performance of official duties and approved reimbursement of "all medical expenses, together with the round trip travel expenses to Sweden, certified by the Medical Director as reasonable and directly related to the injury". The Secretary-General accepted this recommendation on 10 November 1993.

On 12 December 1995, the ABCC recommended compensation under Appendix D in the amount of US$40,612.00, equivalent to a fifty-five per cent loss of function of the whole person under article 11.3 of Appendix D, as well as reimbursement of the round-trip travel

between New York and Lund, and special sick leave credit under article 18(a) of Appendix D from 17 August 1992, until the first day of entitlement to a disability pension to be determined by the UNJSPF. This recommendation was adopted by the Secretary-General on 16 December 1995. A cheque for $42,497.80, representing $40,612.00 in compensation, $389.80 in medical expenses certified as of that date, and $1,496.00 for a round-trip Economy air ticket New York/Lund/New York, was issued on 30 January 1996.

On 23 February 1996, the Applicant was informed by the Secretary, UNJSPF, that the Pension Committee had determined him to be incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund.

On 29 March 1996, the Chief, Cluster IV, OHRM, recommended to the Assistant Secretary-General, OHRM, that the Applicant's fixed-term appointment be terminated for reasons of health under staff regulation 9.1(a). On 2 April 1996, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his appointment with effect from the date of the notice.

On 10 July 1996, the Applicant's counsel wrote to the Executive Officer, DAM, claiming daily subsistence allowance (DSA) for the periods of the Applicant's medical evacuation and subsequent medical travel to Sweden. The Executive Officer, DAM, responded on 17 July 1996, noting that under PD/1/1992, DSA was not payable when medical evacuation had been authorized to the staff member's place of home leave, except for actual expenses for a hotel or other accommodations, on the basis of receipts. She further suggested that if the Applicant wished to pursue the matter further he should submit copies of the relevant receipts to the Secretary, ABCC.

On 1 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent was grossly negligent in carrying out the medical evacuation of the Applicant from Iraq and failed to follow proper procedures for such evacuation, resulting in the Applicant's irreparable physical and psychological injuries.

2. The Applicant was entitled to receive DSA for the periods of 18 August 1992 to 7 May 1993 and 13 September 1993 to 25 June 1995, when he was in Sweden undergoing medical treatment. The Respondent's failure to pay the Applicant such DSA violates the Applicant's rights.

3. The Respondent insufficiently compensated the Applicant for his service-incurred injuries.

4. The Respondent's delays in paying the Applicant the compensation due him violated his rights and exacerbated the Applicant's psychological injuries.

5. The Applicant should be permitted to review his medical files.

6. The Respondent should be required to pay to the Applicant punitive damages.

Whereas the Respondent's principal contentions are:

1. The Applicant's injuries were recognized as being attributable to the performance of official duties, and he was compensated in accordance with staff rule 106.4 and Appendix D to the Staff Rules.

2. The medical evacuation and subsequent medical travel were in accordance with applicable procedures.

3. The Applicant had no entitlement to DSA while in Sweden.

4. The Applicant had access to all relevant files.

The Tribunal, having deliberated from 6 to 31 July 1998, now pronounces the following judgement:

I. The Applicant argues that his medical evacuation from Iraq to Lund, Sweden, was not in accordance with procedures articulated in PD/1/1992 concerning medical evacuations. The record before the Tribunal regarding how the decision was made to evacuate the Applicant to Sweden is not entirely clear. In response to questions put to the Respondent by the Tribunal, the Respondent provided documentation that indicates that the Senior Medical Officer (SMO), UNSCOM, telephoned the Office of the Medical Director at Headquarters shortly after the Applicant sustained his injury. According to that documentation, the SMO, UNSCOM, was told that the Applicant should be evacuated to New York. The original submissions by the parties indicated that after the Head of Office (the Chief, UNGCI) decided to evacuate the Applicant to Sweden, a facsimile was received from the Office of the Medical Director at Headquarters, ordering evacuation to New York. It is not necessary to determine whether this order was ignored and by whom, for the Tribunal to reach a decision, as both the Office of the Medical Director and the Head of Office improperly applied to the Applicant the policies for medical evacuation of the Applicant. Nevertheless, on this occasion, the Tribunal wishes to remind the Respondent that it is the duty of the parties to submit a complete and accurate record of the relevant facts to the Tribunal.

II. Under paragraph 8 of PD/1/1992, the Head of Office has the authority to determine the place to which a staff member should be medically evacuated and then advise the Medical Director of the decision. This policy allows the Head of Office to make immediate and informed choices in an emergency situation. In authorizing the evacuation to Sweden, the Head of Office apparently relied on paragraph 17 of PD/1/1992 which states that "for illnesses requiring a prolonged recuperation period, medical evacuation to the place of home leave should be encouraged." In relying on paragraph 17, the Head of Office apparently ignored the nature of the Applicant's injury, as that paragraph refers to "illnesses". The Tribunal does not understand why a gunshot wound to the abdomen was considered an "illness". It seems far more likely that a gunshot wound is an "extreme medical emergency"

for which medical evacuation "shall be authorized, as a general rule, to the place nearest the duty station where adequate medical facilities are available bearing in mind the particular nature of illness or injury involved, the type of treatment required, and the languages spoken." (Paragraph 15 of PD/1/1992) Three regional medical facilities in the Middle East are listed in PD/1/1992: Amman, Jerusalem, and Cairo. If the Head of Office had applied the rule, bearing in mind that the injury was a gunshot wound to the lower abdomen with a bullet, or fragments thereof, "lodged near the lesser trochanter of left femur", he should have chosen one of these three places as the destination of the evacuation.

In response to questions from the Tribunal, the Respondent disclosed that, in addition to the Personnel Directive on Medical Evacuation, there was a specific Medical Evacuation Plan for Iraq. That plan provides detailed guidance for the handling of medical evacuations. The Respondent did not refer to this document until the Tribunal's questions were put to him. If that plan had been utilized by the Head of Office, he could only have considered the gunshot wound as necessitating a "Medical Transport" rather than an "Emergency Medical Evacuation" for the evacuation to Sweden to have resulted. If the gunshot wound calls for an Emergency Medical Evacuation, the evacuation "must be completed within 12 hours", and the receiving hospital specified in the Evacuation Plan is in Kuwait. The Respondent admitted that the Head of Office never considered evacuation to Amman, Jerusalem or Cairo. The Tribunal can only surmise that evacuation to Kuwait was never considered either.

III. The record before the Tribunal clearly reflects that the gunshot wound to the abdomen was not superficial. The report of the Senior Medical Officer, UNGCI, which the Head of Office sent to Headquarters, indicates that it was known at the outset that surgery was necessary and that adequate facilities were not available in Suleimaniyah. The Head of Office's decision to evacuate the Applicant to Sweden rather than to Amman, Jerusalem, Cairo or Kuwait is only the first in a series of poor judgements in relation to the Applicant. Furthermore, it is almost certain that all the ultimate physical and psychological injuries

sustained by the Applicant arise from this poor decision. At the time of the first medical review of the Applicant's condition by the physician at Suleimaniyah, the potential danger to the left femoral vein was noted. The significance of no arterial damage "till now" is written in that report, which was a result of an examination only 4 hours after the injury was sustained. Apparently, the harm that could result from an abdominal wound was either not understood or was underestimated by those who made the decision to evacuate the Applicant to Sweden. Some 56 hours elapsed from the time of the gunshot wound until the Applicant received the surgical treatment that was recognized at the outset as necessary. There can be no adequate reason for the error in judgement that was made by those who decided to treat an extreme medical emergency as if it were merely a toothache.

The record before the Tribunal provides in excruciating detail the results of this failure to treat the wound promptly. It can never be known if prompt treatment would have prevented what has occurred, but there is certainly a greater likelihood that the consequences would not have occurred. The Applicant needed immediate skilled attention from a medical team with expertise in treating gunshot wounds. The Tribunal notes that any of the sites listed in the directive or in the Evacuation Plan -- Amman, Jerusalem, Cairo, or Kuwait -- are likely to have this expertise. Thus, the Tribunal finds that there is no doubt that an error was made in the evacuation decision. The Tribunal cannot imagine why the Applicant was evacuated to Sweden, unless there was a misunderstanding of the possible serious consequences after a gunshot wound, however stable the condition of the victim in the immediate aftermath of the injury. The results were grave for the Applicant, who has lost his livelihood, his capacity to enjoy physical activity, and who still suffers from post-traumatic stress syndrome, which in all likelihood has been exacerbated by the reprehensible manner in which the Respondent has treated him since the initial injury occurred. The Tribunal finds that the Applicant had reason to expect that the organization for which he volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide him the

greatest opportunity to recover fully from any injury to his physical or mental health that resulted from that service. In this regard, the Respondent has failed.

IV. In addition to this basic claim which is the crux of the matter, the Applicant raises several other claims. He argues that the Respondent failed to provide adequate security so as to allow him to conduct his official duties with the degree of protection that would have avoided the injury he sustained. He also challenges the manner in which the Respondent dealt with the issues related to his injury. The Applicant alleges that the compensation and reimbursements paid to him were inadequate in amount and were unduly delayed. The Applicant also contends that the Respondent was mistaken in determining the location of his home and family leave, thereby denying him daily subsistence allowance (DSA) while medically recuperating in Sweden. Finally, the Applicant argues that the Respondent improperly denied him access to certain medical files. Each of these contentions will be dealt with below.

V. Although the Applicant has presented some evidence that supports his claim that the Respondent failed to provide adequate protection, he has not fully substantiated this claim. It is not necessary to do so, however, as the principal claim relates to what occurred after the injury was sustained. The Tribunal rejects this claim.

VI. On 10 November 1993, the Secretary-General approved the ABCC's recommendation that the Applicant's injury be considered as attributable to the performance of official duties on behalf of the United Nations. In response to this service-incurred medical condition, the Respondent, on two separate occasions (30 January 1996 and 24 April 1996), paid lump sum amounts to the Applicant. The $42,497.80 paid to the Applicant in January of 1996 represented $40,612.00 in compensation for an injury attributable to the performance of

official duties, $389.80 in medical expenses certified at that date, and $1,496.00 for a round-trip Economy air ticket from New York to Lund, Sweden.

VII. The Applicant argues that the $40,612 is insufficient compensation for his injury attributable to service with the UN. He contends that the amount fails to take into account adequately his emotional, psychological and physical pain and suffering. But article 11.3(a) of Appendix D states:

> "In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule set out in paragraph *(c)* below ... and applying, where necessary, proportionate and corresponding amounts in those cases of permanent disfigurement or loss of member or function not specifically referred to in the schedule."

The schedule provided in subsection *(c)* of article 11.3 only lists objective physical loss and not emotional or psychological damages. Indeed, the maximum compensation allowed can not exceed twice the annual amount of the pensionable remuneration at the P-4, step V level, for the loss of both arms, hands, legs, feet or sight in both eyes.

VIII. The Applicant argues that the Tribunal has the discretion to assess additional damages for non-physical pain and suffering. However, the UN has specifically addressed the issue of damages for injuries incurred during service with the Organization. Compensation is based on an objective assessment of loss of function derived from medical reports submitted by the claimant and in accordance with the *AMA Guidelines to the Evaluation of Permanent Impairment*. Accordingly, the limitations outlined in article 11.3 are binding and not susceptible to subjective valuations of pain and suffering. The ABCC's recommendation, approved by the Secretary-General, of compensation for 55 per cent of loss of function of the whole person, is not unreasonable for the injuries suffered by the Applicant.

The Respondent adhered to the procedures and compensation schedule established by Appendix D of the Staff Rules. Since the Respondent fairly applied the Staff Rules and paid the amount determined according to the schedule provided in article 11.3(c), the Tribunal will not disturb that decision.

IX. The Tribunal notes that, under article 17 of Appendix D, the "[r]econsideration of the determination by the Secretary-General ... of the type and degree of disability may be requested" by the applicant. A medical board consisting of: (i) a qualified physician selected by the claimant; (ii) the UN Medical Director or a representative; and (iii) a qualified medical practitioner selected by the first two, would then be set up to evaluate the claim for compensation. The Applicant in this dispute made no effort to avail himself of this procedure.

X. The Applicant also charges that the Respondent has not fully reimbursed him for the expenses he incurred. Specifically, the Applicant argues that the Respondent has failed to reimburse necessary Business Class travel expenses for his return flight from Lund to New York after receiving additional medical treatment in Sweden. Prior to returning to Lund for a medical evaluation, the Applicant submitted a request for reimbursement for travel expenses. The ABCC determined that these costs were related to the Applicant's injury attributable to service and therefore reimbursable. The Secretary-General approved this recommendation. None of the documents relating to this reimbursement suggest that the Applicant was entitled to a Business Class fare. Indeed, in connection with a prior reimbursement request in April 1993, for travel from Lund to New York, the Applicant's physician explicitly requested that the Applicant have a Business Class seat. The UN Medical Director's approval of this request also explicitly stated that the reimbursement should be for Business Class. However, the request of 10 August 1993, for reimbursement of round-trip tickets, did not mention the need of a Business Class seat, nor was any approval for Business Class travel given at that time.

Nor did the recommendation by the ABCC refer to reimbursement for Business Class travel. Therefore, the Respondent is justified in only reimbursing the Applicant for the amount needed for Economy Class air fare. Staff rule 107.10(a) reads "[f]or all official travel by air, staff members and their eligible family members shall be provided with Economy Class transportation ..." The Applicant also contends that he should be reimbursed for the Business Class round-trip airfare he subsequently had to purchase from Sabena Airlines in Lund since his return route to New York on Delta Airlines had been discontinued. However, the Applicant had not been authorized to fly Business Class. In addition, staff rule 107.12(a) states that "[u]nless the staff member concerned is specifically authorized to make other arrangements", the tickets for official travel "shall be purchased by the United Nations". There is no indication that the Applicant had been given the authority to make such alternative arrangements.

XI. The Respondent made a second lump sum payment to the Applicant in April 1996, in the amount of $22,379.80. The Applicant contends that the Respondent's final reimbursement is inadequate, not in amount, but in the delay in payment.

XII. Article 18(a) of Appendix D dealing with an injury attributable to the performance of official duties states:

> "Authorized absences occasioned by the injury or illness shall be charged to the sick leave of the staff member. Following the exhaustion of sick leave and subject to any prior separation, the staff member shall be placed on special leave (under staff rule 105.2). Any special leave granted under this paragraph covering the period when the staff member is paid compensation equivalent to salary and allowances in accordance with article 11.1(b) or 11.2(b), shall be deemed special leave with pay, while any period of subsequent special leave shall be deemed special leave without pay."

The Applicant was placed on sick leave with full pay until 31 August 1993. Accordingly, with effect from 1 September 1993, the Applicant was placed on special leave without pay under staff rule 105.2(a)(i) pending resolution of his status. On 21 September 1994, the Applicant wrote to the Secretary, ABCC, in order to request special sick leave credit under article 18(a) of Appendix D to the Staff Rules. Special sick leave credit was recommended by the ABCC in November 1995 and approved by the Secretary-General on 16 December 1995.

XIII. Unfortunately, this scenario does not fully explain how the rules were applied in the Applicant's case. The Secretary, ABCC, wrote to the Applicant in July 1994, to inform him that

> "you were advised of all your entitlements under Appendix D to the Staff Rules, namely that under the provisions of Article 11.1(b)(ii) of Appendix D, the salary and allowances which you were receiving at the date on which you last attended at duty shall continue to be paid until the date of the termination of your appointment or the expiry of one calendar year from the first day of absence from the injury, whichever is earlier. Taking into account that your accident occurred on 17 August 1992, it therefore could explain the reason your salary was withheld as of September 1993."

This misstates Article 11.1(b) which reads, in relevant part, as follows:

> "the salary and allowances which the staff member was receiving at the date on which he last attended at duty ... shall continue to be paid to the staff member until ... (ii) If, by reason of his disability, he does not return to duty, then until the date of the termination of his appointment or the expiry of one calendar year from the first day of absence resulting from the injury or illness, whichever is the *later*." (Emphasis added)

It remains unclear why the Applicant's salary was cut off in September 1993. In a memorandum to the Executive Officer, Department of Administration and Management (DAM), the Secretary, ABCC, had written that

> "Under Article 18(a) of Appendix D, any authorized absences are charged to the sick leave of the staff member. Following the exhaustion of sick leave, the staff member shall be placed on special leave with full pay covering the period of Article 11.1(b) - one calendar year from the date of accident - and on special leave without pay for any period of subsequent special leave."

But if the Applicant was receiving sick leave with pay after the accident under Article 18(a), then under a proper reading of article 11.1(b), payment should have continued until the Applicant's termination, since that occurred later than the "expiry of one calendar year from the first day of absence". Unfortunately, how these rules were applied in this case is ambiguous and the Respondent fails to provide a satisfactory explanation. As early as November 1993, the Applicant's injury was recognized by the Secretary-General as attributable to service, yet he did not receive his salary until April 1996. The Tribunal finds this delay unreasonable and the Applicant should be compensated for it.

XIV. The Applicant asserts that not only was he improperly evacuated from Iraq after being shot, but also that the Respondent failed to pay DSA while he was recuperating in Sweden. A staff member's entitlement to DSA is directly dependent on his or her entitlement to home leave. The Applicant, while in New York, was recruited by the United Nations to work at Headquarters. Therefore, under staff rule 104.6, the Applicant was considered a locally recruited staff member, ineligible for home or family leave. However, as both the Applicant and the Respondent note, locally recruited staff members are entitled to home and family leave when detailed on an international mission lasting longer than six months. But the parties disagree on where the Applicant may take home leave: the country of his nationality or the country from which he was locally recruited. The Applicant contends that locally recruited staff members on international detail should be entitled to take home leave in the country where they were recruited. The Applicant argues that, at the time of his injury, not only was he a resident of New York, but his wife was as well. But staff rule 105.3(d), concerning home leave, states "The country of home leave shall be the country of the staff

member's nationality". According to staff rule 105.3(d)(iii), only the Secretary-General may authorize a "country other than the country of nationality as the home country, for the purposes of this rule." To be granted such an exception, the staff member must show "that [he or she] maintained normal residence in such other country, for a prolonged period preceding his or her appointment, that the staff member continues to have close family and personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3". Although, the Applicant's circumstances present grounds for a possible exception to this rule, the Applicant never sought such an exception from the Secretary-General. Therefore, the Tribunal is in no position to grant such a dispensation. The country of the Applicant's nationality is his home country.

The Applicant was medically evacuated to his home country. Under PD/1/1992, the availability of DSA is very limited for medical evacuations to the home country. "Actual expenses for a hotel room or other accommodations (meals included) incurred by the patient ... may be reimbursed, on the basis of receipts" for staff members evacuated to their home country. Only expenses incurred during the first forty-five days following evacuation may be reimbursed. Reimbursements are capped at 50 per cent of the subsistence allowance payable to staff members medically evacuated to countries other than their place of home leave. The Applicant made no effort to obtain reimbursements by submitting the necessary receipts.

XV. Finally, the Applicant alleges that the Respondent has denied him access to the relevant files in this dispute. The Respondent contends that the Applicant is mistaken in the application of ST/IC/82/77/Rev.1 and ST/IC/88/19 to medical files and other working files maintained by the Organization. The Tribunal agrees that neither of these information circulars is applicable here and finds that the Applicant has had access to his relevant Official Status file and ABCC files.

XVI. The Applicant maintains that he should have access to the medical records kept on him by the Organization. The Respondent argues that the medical files are maintained by the Organization for the Organization's benefit and not for that of the staff member. These files are therefore not made available to the staff member. They are, however, made available to the staff member's personal physician when necessary. The Applicant charges that keeping these medical files confidential violates ST/IC/82/77/Rev.1 which abolishes confidential files. Unfortunately, the Applicant has misconstrued the application of this provision. ST/IC/82/77/Rev.1 deals with the abolition of the confidential file contained within the staff member's personnel files and its application refers expressly to "personnel records". The personnel file, however, is distinct from the staff member's medical file. Therefore, ST/IC/82/77/Rev.1 does not relate in any way to medical files. As regards the medical files, the Tribunal requested the Respondent to provide the Applicant's medical file to the Tribunal for a review in camera. In this case, the medical files did contain information crucial to the claims made by the Applicant. The Tribunal did not order transmittal of the medical files to the Applicant because all relevant medical information that was pertinent had already been provided to the Tribunal by the Respondent and then to the Applicant by the Tribunal. The Tribunal fails to understand the rationale for preventing staff from access to their own medical files. It recommends that this policy be reconsidered and reversed.

XVII. For the above stated reasons, the Tribunal finds that the Applicant has been adequately compensated for his injury attributable to official duties and that DSA payments were properly denied. However, the Respondent unreasonably withheld the reimbursement of the Applicant's salary payments and he should be compensated for the delay. Finally and most importantly, the Applicant should be compensated for the injuries he suffered as a result of his improper evacuation from Iraq to Sweden.

XVIII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant three years of his net base salary as compensation. In granting this compensation, which exceeds the two-year limit mandated by article 9 of its Statute, the Tribunal has particularly taken into account the special circumstances of this case, namely the Respondent's gross negligence in the handling of an extreme medical emergency arising in a situation known to be very dangerous to the Applicant, which resulted in severe physical and psychological impairment for the Applicant.

The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary